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AmFinance Berhad v KT Steel Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT 1–22–520 OF 1999
B SYED AHMAD HELMY J
28 MARCH 2007

Contract — Guarantee — Validity — Guarantee was only signed by three out of four
C *sureties — Whether void — Contracts Act 1950 s 97*

Contract — Illegality — Facility agreement — Whether equipment lease agreement was a lease agreement or a loan agreement — Whether void under s 4 of the Bill of Sale Act 1950 for non-registration
D

Contract — Lease — Non-registration — Whether equipment lease agreement was a lease agreement or a loan agreement — Whether void under s 4 of the Bill of Sale Act 1950 for non-registration.
E

The first defendant purchased an equipment from M & M Greaves Machinery Atlas Works pursuant to a contract of sale agreement dated 1 September 1996. On the 27 September 1996 the first defendant applied to the plaintiff for financing facilities
F which was approved by the plaintiff through the letter of offer dated 12 October 1996. On the 20 March 1997 the first defendant and the plaintiff executed the document in the form of and under the heading of an equipment lease agreement which incorporated the terms of the letter of offer dated 12 October 1996. On the 20 March 1997 the second, third and fourth defendants executed a guarantee
G document. The sole issue for determination as agreed upon by the parties was whether the equipment lease agreement dated 20 March 1997 was a lease agreement or a loan agreement void under s 4 of the Bill of Sale Act 1950 for non-registration.

H **Held**, dismissing plaintiff's claims with costs:

(1) The equipment in question was installed and fixed on the first defendant's premises. Under ss 19 and 20 of the Sales of Goods Act 1957 the property in and the ownership of the equipment had passed to the first defendant. There was no evidence on record to show that the ownership of the equipment
I was purchased or transferred to or belonged to the plaintiff. It was pertinent to note that in the agreement dated 20 March 1997 between the plaintiff and the first defendant under the form and heading of equipment lease agreement the plaintiff expressly covenanted that the 'lessor has agreed to purchase/has purchased the equipment' and hence the plaintiff had the onus of proving that they had assumed the ownership of the equipment through documentary

evidence which onus the plaintiff had failed to discharge. The full sum of RM2.3m was disbursed to the first defendant on the same date as the execution of the equipment lease agreement and was paid directly to the first defendant and not directly to the seller of the equipment thus a clear contravention of cl 16(a) of the letter of offer (see paras 5-6).

(2) It was also pertinent to note that the plaintiff covenanted in cl 16(b) of the letter of offer that there would be reimbursement of any monies paid by the first defendant. The monies that was released by the plaintiff on 20 March 1997 could not qualify as a reimbursement as the payment to the seller was only effected on 25 March 1997. Hence the transaction could not be an equipment lease agreement though labeled as such (see para 7).

(3) The purported lease agreement was a sham to cloak and disguise the money lending transaction. Since it was money lending transaction and the purported lease agreement had not complied with the Bills of Sale Act 1950, it was illegal and void for non-registration by virtue of s 4 of the Act (see para 17(2)).

(4) Since the loan and the guarantee were granted by the plaintiff without security it had also violated s 60 of the Banking and Financial Institutions Act 1989 (BAFIA 1989). Since the lease agreement itself was an illegal transaction then the letter of guarantee was also tainted by illegality and was thereby unenforceable. Alternatively the guarantee was also void by reason of s 97 of the Contracts Act 1950 as the guarantee was only signed by three out of the four sureties who were supposed to have signed the surety. The guarantee was also void by reason of uncertainty as the name of the lessee or the lease agreement was not stated in the guarantee and therefore there was no indication showing what the sureties were in fact guaranteeing. By virtue of s 24 of the Contracts Act 1950 the lease agreement was void because of non compliance of the Bills of Sale Act and BAFIA 1989(see para 17(3)–(6)).

[Bahasa Malaysia summary

Defendan pertama membeli satu peralatan daripada M & M Greaves Machinery Atlas Works melalui satu perjanjian kontrak jualan bertarikh 1 September 1996. Pada 27 September 1996 defendan pertama memohon kepada plaintif untuk satu kemudahan pembiayaan kewangan yang diluluskan oleh plaintif melalui surat tawaran bertarikh 12 Oktober 1996. Pada 20 Mac 1997 defendan pertama dan plaintif menandatangani satu dokumen dalam bentuk dan di bawah tajuk perjanjian pajakan peralatan yang mengandungi terma-terma surat tawaran yang bertarikh 12 Oktober 1996. Pada 20 Mac 1997 defendan kedua, ketiga dan keempat menandatangani satu dokumen jaminan. Isu yang tunggal untuk diputuskan seperti yang dipersetujui oleh pihak-pihak ialah sama ada perjanjian pajakan peralatan bertarikh 20 Mac 1997 adalah satu perjanjian pajakan atau satu perjanjian pinjaman yang tidak sah di bawah s 4 Akta Bil Jualan 1950 kerana tidak didaftarkan.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Peralatan tersebut telah dipasangkan di premis defendan pertama. Di bawah

ss 19 dan 20 Akta Jualan Barangan 1957 hak milik diperalatan tersebut telah beralih kepada defendan pertama. Tiada bukti yang menunjukkan bahawa pemilikan peralatan tersebut dibeli atau dialihkan kepada atau dimiliki plaintif. Ia adalah penting untuk diperhatikan bahawa perjanjian bertarikh 20 Mac 1997 di antara plaintif dan defendan pertama di bawah bentuk dan tajuk perjanjian pajakan peralatan plaintif secara nyata waadkan bahawa 'lessor has agreed to purchase/has purchased the equipment' dan dengan itu plaintif mempunyai tanggungjawab untuk membuktikan bahawa mereka telah mengambil alih pemilikan peralatan tersebut melalui bukti dokumen yang mana plaintif telah gagal membuktikannya. Jumlah penuh RM2.3 juta telah dikeluarkan kepada defendan pertama pada tarikh yang sama apabila perjanjian pajakan peralatan ditandatangani dan dibayar terus kepada defendan pertama dan bukannya terus kepada penjual peralatan tersebut dengan itu ia jelas melanggar klausa 16(a) surat tawaran tersebut (lihat perenggan 5-6).

(2) Ia juga penting untuk di perhatikan bahawa plaintif waad di klausa 16(b) surat tawaran tersebut bahawa akan terdapat satu pembayaran balik sebarang wang yang telah dibayar oleh defendan pertama. Wang yang dilepaskan oleh plaintif pada 20 Mac 1997 tidak dapat dikatakan sebagai satu pembayaran balik oleh kerana bayaran kepada penjual hanya dibuat pada 25 Mac 1997. Dengan itu transaksi tersebut bukannya satu perjanjian pajakan peralatan walaupun ia dilabel sedemikian (lihat perenggan 7).

(3) Perjanjian pajakan tersebut kononnya adalah satu penipuan untuk menutup dan menyamar transaksi pinjaman wang. Oleh kerana ia adalah transaksi pinjaman wang dan perjanjian pajakan kononnya tidak mengikut Akta Bil Jualan 1950, ia adalah tidak sah disisi undang-undang dan terbatal kerana tidak didaftarkan mengikut s 4 Akta tersebut (lihat perenggan 17(2)).

(4) Oleh kerana pinjaman dan jaminan yang diberikan oleh plaintif tanpa sekuriti ia juga telah melanggar s 60 Akta Bank dan Institusi-Institusi Kewangan 1989 (ABIK 1989). Oleh kerana perjanjian pajakan tersebut adalah satu transaksi menyalahi undang-undang maka surat jaminan juga dicemari dengan kesalahan undang-undang dan dengan itu tidak berkuatkuasa. Secara alternatif jaminan tersebut adalah terbatal disebabkan s 97 Akta Kontrak 1950 oleh kerana jaminan tersebut ditandatangani oleh tiga daripada empat penjamin yang sepatutnya menandatangani jaminan tersebut. Jaminan tersebut adalah terbatal disebabkan ketidakpastian berhubung dengan nama pemegang pajakan atau perjanjian pajakan tersebut tidak dinyatkaan dan dengan itu tiada tanda menunjukkan apa sebenarnya penjamin-penjamin menjamin. Mengikut s 24 Akta Kontrak 1950 perjanjian pajakan tersebut adalah terbatal oleh kerana tidak mengikut Akta Bil Jualan dan ABIK 1989 (lihat perenggan 17(3)-(6)).]

Notes

For cases on validity, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3569–3575.

For a case on facility agreement, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3656.

For cases on lease genarally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3778–3789.

Cases referred to

Len Min Kong v United Malayan Banking Corporation Bhd & Anor Appeal [1998] 2 MLJ 478 (refd)
Major Kassim Shariff v Kwong Yik Finance Bhd [2001] 6 CLJ 397 (refd)
Snook v London & West Riding Investment Ltd CA [1967] 1 All ER 518 (refd)
Stoneleigh Finance Ltd. v Phillips & Ors CA [1965] 1 All ER 513 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 60
Bill of Sale Act 1950 s 4
Contracts Act 1950 ss 24, 97
Sales of Goods Act 1957 ss 19, 20

S Sagadeva, (Rosdi Amir with him) (JS Pillay & Mohd Haaziq) for the plaintiff.
Wong Kim Fatt (S Palani Vel & Tee Yee Koon with him) S Palani Aishah & Co) for the defendants.

Syed Ahmad Helmy J:

[1] The sole issue for determination as agreed upon by the parties is whether the equipment lease agreement dated 20 March 1997 is a lease agreement or a loan agreement void under the Bill of Sale Act 1950 for non-registration under s 4 thereof.

[2] In approaching the determination of the issue aforesaid the parties have agreed to the following documents:

(1) statement of agreed facts - marked 'A';

(2) statement of issue for determination marked 'B';

(3) bundle of documents marked 'C';

(4) plaintiffs witness statement marked 'PWS–1';

(5) defendant's witness statement marked 'DWS–1'.

[3] It is only appropriate to relate to the factual matrix and sequence of events as borne out by the bundle of documents and the respective witness statement of the parties in the determination of the issue aforesaid.

(1) The equipment in question is one used bar and section cross country hot rolling mill ('equipment') installed at the first defendant's steel factory in Kota Tinggi.

(2) The first defendant purchased the equipment from M & M Greaves Machinery Atlas Works pursuant to a contract of sale agreement dated 1 September 1996 — see pp 1 to 13 of bundle C. The purchase price and the terms of payment was as expressly stated therein.

(3) On the 27 September 1996 the first defendant applied to the plaintiff for financing facilities which was approved by the plaintiff through the letter of offer dated 12 October 1996 — see pp 18 to 23 bundle C.

(4) On the 20 March 1997 the first defendant and the plaintiff executed the document in the form of and under the heading of an equipment lease agreement which incorporates the terms of the letter of offer dated 12 October 1996 and other additional express terms — see pp 42 to 59 bundle C.

(5) On the 20 March 1997 the second, third and fourth defendants executed the Guarantee document — see pp 60 to 63 bundle C without the due execution of R. Gerage a/l Ramasamy whose name was expressly stated as a guarantor but duly witnessed by the plaintiff.

[4] Upon evaluating the evidence as adduced by the parties respective witness statement and the bundle of documents it is my judgment that the plaintiffs have on a balance of probabilities failed to prove their claim against the defendants for the reasons hereinafter appearing:

[5] The sale and purchase agreement dated 1 September 1996 was entered into by the first defendant as purchaser and M & M Greaves Machinery Atlas Works as seller. The equipment in question was installed and fixed on the first defendant's premises. Under ss 19 and 20 of the Sales of Goods Act 1957 the property in and the ownership of the Equipment had passed to the first defendant. There is no evidence on record to show that the ownership of the equipment was purchased or transferred to or belong to the plaintiff. It is pertinent to note that in the agreement dated 20 March 1997 between the plaintiff and the first defendant under the form and heading of equipment lease agreement the plaintiff expressly covenanted that the 'lessor has agreed to purchase/has purchased the equipment' and hence the plaintiff to my mind has the onus of proving that they have assumed the ownership of the equipment through documentary evidence which onus the plaintiff have failed to discharge. It is trite that in determining whether the lease agreement is a lease agreement what matters most is the substance and not the form and it is also trite that for a lessor to lease the equipment they must be seised with ownership which the evidence herein is lacking.

[6] It is also my finding that the full sum of RM2.3m was disbursed to the first defendant on the same date as the execution of the equipment lease agreement as 20 March 1997 and was paid directly to the first defendant and not directly to the seller of the equipment as evidenced by p 69 of bundle C. The seller M & M Greaves issued the invoice in the name of the first defendant and not the plaintiff — see p 96 of bundle C - thus to my mind is clear contravention of cl 16(a) of the letter of offer.

[7] It is also pertinent to note that the plaintiff covenanted in cl 16(b) of the letter of offer that there would be reimbursement of any monies paid by the first defendant. The monies that was released by the plaintiff on 20 March 1997 cannot qualify as an reimbursement as the payment to the seller was only effected on 25 March 1997. Hence the transaction cannot be an equipment lease agreement though labeled as such.

[8] By reason of my finding aforesaid to all intents and purposes the equipment lease agreement was a loan on the security of the equipment and a bill of sale which by reason of it not being registered under the Bills of Sale Act 1950 makes the transaction void.

[9] As I have earlier stated to determine whether the transaction is a leasing agreement or otherwise it is necessary to look behind the equipment lease agreement to discover its true nature and if the facts are not truly stated in the documents there are circumstances tending to show that the documents were a mere cloak — *Major Kassim Shariffv Kwong Yik Finance Bhd* [2001] 6 CLJ 397.

[10] Though the sum of RM2.3 million was paid to the seller nevertheless there was still a shortfall occasioned by the Ringgit/Pound ratio which had escalated from 3.8:1 to 7.5:1 during the 1997 recession which shortfall was provided by the plaintiff to the seller pursuant to a bank guarantee dated 15 August 1997 in the seller's favour. By the terms of the guarantee the plaintiff acknowledged that the agreement to purchase the equipment was entered into by the first defendant and that the plaintiff guaranteed to pay the seller in the event the first defendant fails to make payment. The guarantee aforesaid reinforces the plaintiffs role as a financier to assist the first defendant to acquire the equipment for its business.

[11] The plaintiffs reliance on the two English cases of *Stoneleigh Finance Ltd v Phillips & Ors* [1965] 1 All ER 513 (CA) and in *Snook v London & West Riding Investment Ltd* [1967] 1 All ER 518 (CA) cannot be supportive of the plaintiffs position as the facts therein revealed that the finance company had purchased the subject matter as at the date of the hire purchase agreement which was not the case here.

[12] Turning to the letter of guarantee dated 20 March 1997 there were four guarantors named but only three had signed it. The fourth guarantor named ie, one R Gevage a/l Ramasamy, did not sign the guarantee although it had been witnessed by the plaintiffs officer Mohd Farid A Rahim. It is imperative to note that in the letter of offer dated 12 October 1996 the joint and several guarantee must be given by all the four named persons — see p 19 bundle C.

[13] In disputing liability counsel for the second, third and fourth defendants relied on s 97 of the Contracts Act which provides 'where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join'. In the Court of Appeal decision *Len Min Kong v United Malayan Banking Corporation Bhd & Anor Appeal* [1998] 2 MLJ 478, s 97 was discussed and Gopal Sri Ram JCA stated at p 495:

> In our judgment, the following propositions may be culled from the authorities on the point under discussion:
>
> (1) Section 97 of the Contracts Act 1950 embodies the rule invented by the Court of Chancery to relieve sureties from the burden of their liability which, but for the operation of the rule, would be strict at common law.

(2) When interpreting s 97, guidance may reasonably be sought from cases decided in other jurisdictions which, while recognizing the existence of the rule, do not have any provision in their written law that is parallel to s 97 of our Act or s 144 of the Indian statute.

(3) The phrase 'upon a contract' appearing in s 97 does not confine the parties to the contract of guarantee itself but includes an arrangement between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee. In other words, a guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence aliunde to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor.

[14] Section 97 of the Contracts Act 1950 embodies the rule invented by the Court of Chancery to relieve sureties from the burden of their liability which, but for the operation of the rule, would be strict at common law. (2) When interpreting s 97, guidance may reasonably be sought from cases decided in other jurisdictions which, while recognizing the existence of the rule, do not have any provision in their written law that is parallel to s 97 of our Act or s 144 of the Indian statute. (3) The phrase 'upon a contract' appearing in s 97 does not confine the parties to the contract of guarantee itself but includes an arrangement between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee. In other words, a guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence aliunde to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor.

[15] The factual matrix here to my mind establishes that there existed an arrangement between the parties that the liability under the guarantee of the guarantors depends on the execution of the guarantee by all four guarantors. This is evident by the fact that not only was the terms of the letter of offer expressly provides for the execution of the letter of guarantee by all the four persons named therein but the letter of guarantee also bears the name of R Gerage a/l Ramasamy which execution column though not signed by him bears the signature of the witness of the plaintiffs officer one Mohd Farid A Rahim.

[16] I also wish to stress that the Plaintiffs had through their solicitor's letter of demand dated 14 May 1999 demanded payment from all four guarantors which goes to show that the liability of the guarantors depended on the due execution of all four guarantors – see pp 110 to 112 bundle C.

[17] To summarize the position it is my considered judgment that:

(1) The property in or the ownership of the equipment remained with the first defendant at all material times. The property in the equipment never passed to the plaintiff, see ss 19 and 20 of the Sale of Goods Act 1957.

(2) The purported lease agreement is a sham to cloak and disguise the money lending transaction. Since it was money lending transaction and the purported lease agreement had not complied with the Bills of Sale Act 1950, it is illegal and void for non-registration by virtue of s 4 of this Act.

(3) Since the loan and the guarantee was granted by the plaintiff without security it has also violated s 60 of the Banking and Financial Institutions Act 1989.

(4) By virtue of s 24 of the Contracts Act 1950 the lease agreement is void because of non compliance of the Bills of Sale Act and BAFIA 1989.

(5) Since the lease agreement itself is an illegal transaction then the letter of guarantee is also tainted by illegality and is thereby unenforceable. Alternatively the guarantee is also void by reason of s 97 of the Contracts Act 1950 as the guarantee was only signed by three out of the four sureties who were supposed to have signed the surety.

(6) The guarantee is also void by reason of uncertainty as the name of the lessee or the lease agreement was not stated in the guarantee and therefore there is no indication showing what the sureties were in fact guaranteeing.

By reason aforesaid the plaintiffs claim is hereby dismissed with costs.

Plaintiff's claims dismissed with costs.

Reported by Sally Kee